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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 157.

ROBERT G. HERVEY AND THE PARIS AND DECATUR RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

THE RHODE ISLAND LOCOMOTIVE WORKS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

C&D . . contract sale Bonds

FILED OCTOBER 15, 1874.

Jan 9 ~~27~~ 1875
Argued
Jas. Dixon

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. Thomas Drummond, judge of the seventh judicial circuit, presiding judge, and the Hon. Samuel H. Treat, district judge of said district, on Monday, the fifteenth day of June, in the June term of said court, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

J. A. JONES, *Clerk.*

RHODE ISLAND LOCOMOTIVE WORKS
vs.
ROBERT G. HERVEY AND THE PARIS AND DECATUR Railroad Company. } In replevin.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

The Rhode Island Locomotive Works, a corporation located and doing business in the State of Rhode Island, plaintiff, puts in its place Messrs. Hay, Greene, and Littler, its attorneys, against Robert G.
2 Hervey, a citizen and resident of the said southern district of Illinois, and the Paris and Decatur Railroad Company, a corporation located and doing business in said southern district of Illinois, defendants, who put in their place Messrs. Ingersoll, Puterbaugh Bros., and McCune and James A. Eads, esq., their attorneys, in a plea wherefore the said defendants took the goods and chattels of the plaintiff and unjustly detained the same against sureties and pledges.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that, heretofore, to wit, on the twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-three, came said plaintiff, by its said attorneys, and filed in the office of the clerk of the circuit court of the United States for said district its bond for costs and affidavit herein; which said bond for costs and affidavit are in the words and figures following, to wit:

Bond for costs.

In the circuit court of the United States for the southern district of the State of Illinois.

3 THE RHODE ISLAND LOCOMOTIVE WORKS, a corporation existing under the laws of the State of Rhode Island,
vs.
ROBERT G. HERVEY & THE PARIS & DECATUR Railroad Company. } Replevin.

We do hereby enter ourselves security for cost in the above-entitled cause, and acknowledge ourselves bound to pay or cause to be paid all costs that may accrue in said cause, either to the opposite party or to the officers of said court in pursuance of law. Dated this 23d day of January, A. D. 1873.

HAY, GREEN & LITTLER.

(Endorsed:) Filed January 23d, 1873. J. A. Jones, clerk.

REC. 157—1

Affidavit of Larned.

In the circuit court for the southern district of Illinois.

Daniel R. Larned, being duly sworn, on his oath deposes and says that he is agent of the Rhode Island Locomotive Works, a corporation created by and existing under the laws of the State of Rhode Island, and which said corporation is a citizen and resident of said State of Rhode Island; that said Rhode Island Locomotive Works is the owner of and lawfully entitled to the immediate possession of two locomotive railroad-engines, named, respectively, the "Olney No. 1," and the "Alfred N. Smyser No. 3;" that said locomotive-engines are each of the value of twelve thousand ($12,000) dollars, and the same are unlawfully detained from the said locomotive-works in the southern district of Illinois by Robert G. Hersey and the Paris & Decatur Railroad Company, the said last-named company being a corporation existing under the laws of the State of Illinois, and said company and said Hersey being residents and citizens of the State of Illinois. Affiant further says that said locomotive-engines have not, nor has either of them, been taken for any tax, assessment, or fine levied by virtue of the laws of the State of Illinois, or of the United States, nor seized under any execution or attachment against the goods and chattels of said Rhode Island Locomotive Works liable to execution or attachment.

DANIEL R. LARNED.

Subscribed and sworn to before me this 23d day of January, A. D. 1873.

J. A. JONES, *Clerk.*

(Endorsed:) Filed January 23, 1873. J. A. Jones, clerk.

Afterwards, to wit, on the said twenty-third day of January of the year aforesaid, a writ of replevin was issued out of said clerk's office in said cause; which said writ of replevin, with return of marshall thereon endorsed, and replevin bond, are in the words and figures following, to wit:

Writ of replevin.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

The United States of America to the marshall of the southern district of Illinois, greeting:

If the Rhode Island Locomotive Works shall give you bond and sufficient security to prosecute its suit with effect against Robert G. Hersey and the Paris and Decatur Railroad Company, and to make return of the following-described property, to wit, two locomotive railroad-engines, named, respectively, the Olney No. 1 and the Alfred N. Smyser No. 3, in said southern district of Illinois, which the said Robert G. Hervey and the Paris and Decatur Railroad Company have and unlawfully detain from the said Rhode Island Locomotive Works, as it by its agent alleges, if return thereof shall be awarded, and further to save and keep you harmless in replevying said property, then we command you that you cause the above property to be replevied and delivered to the said Rhode Island Locomotive Works, and that you

summon the said Robert G. Hersey and the Paris and Decatur Railroad Company, if they be found in your district, to be and appear before our judges of our circuit court of the United States for the southern district of Illinois, at the next term thereof, to be holden at Springfield, in the district aforesaid, on the first Monday of June next, to answer the complaint of the said Rhode Island Locomotive Works for the detention of the said property.

And have you then and there this writ, together with the bond
7 to be taken from the said Rhode Island Locomotive Works.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, at the district aforesaid, on this twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-seventh year.

[SEAL.] J. A. JONES, *Clerk.*

Executed this writ by reading the same to Robert G. Hersey, president of the Paris and Decatur Railroad Company, on the 29th day of January, 1873, and I took possession of the within-named railroad-engines, the Olney No. 1 and the Alfred N. Smyser No. 3, and on the 31st day of January, 1873, I delivered the said engines to Charles Hatry, agent of the within-named Rhode Island Locomotive Works, at Centralia, in my district. I also return the bond in this case.

E. R. ROE,
U. S. Marshall.
N. B. PRETTYMAN,
By Deputy U. S. Marshal.

8 (Endorsed:) Filed February 4, A. D. 1873. J. A. Jones, clerk.

Bond.

Know all men by these presents, that we, the Rhode Island Locomotive Works, as principal, and John Creran, of the city of Chicago, as surety, are held and firmly bound unto Edward R. Roe, United States marshal for the southern district of Illinois, in the penal sum of forty-eight thousand dollars, for the payment of which, well and truly to be made, we bind ourselves, the successors of said Rhode Island Locomotive Works, and the administrators and executors of said sureties.

The condition of the above obligation is such that whereas the Rhode Island Locomotive Works has sued out of the circuit court of the United States for the southern district of Illinois a writ of replevin for the recovery of the possession of two locomotive-engines named, respectively, the Olney No. 1 and the Alfred N. Smyser No. 3, from Robert G. Hervey and the Paris and Decatur Railroad Company, said locomotive-engines being each of the value of twelve thousand dollars:

Now, if the said Locomotive Works, plaintiff in said cause, shall prosecute said suit to effect and without delay, and make return of said property, if a return thereof shall be awarded, and save and keep
9 harmless the marshal of said district in replevying said property, then this obligation to be void; otherwise to remain in full force and effect.

THE RHODE ISLAND LOCOMOTIVE WORKS, [SEAL.]
By DANIEL R. LARNED,
Atty. in fact.
JOHN CRERAR. [SEAL.]
[SEAL.]

And afterwards, to wit, on the thirteenth day of said May of the year aforesaid, came again said plaintiff, by its said attorneys, and filed in said clerk's office its declaration herein; which said declaration is in the words and figures following, to wit:

Declaration.

Circuit court, June term, A. D. 1873.

UNITED STATES OF AMERICA,
Southern District of Illinois:

THE RHODE ISLAND LOCOMOTIVE WORKS
vs.
ROBERT G. HERVEY AND THE PARIS & DECATUR RAILROAD COMPANY. } In replevin.

The Rhode Island Locomotive Works, a corporation created and existing under and by virtue of the laws of the State of Rhode
10 Island, and a resident and citizen of said State of Rhode Island, the plaintiff in this suit, by Hay, Green, and Littler, its attorneys, complains of Robert G. Hervey & the Paris & Decatur Railroad Company, a corporation organized and existing und' and by virtue of the laws of the State of Illinois, and who are residents and citizens of said State of Illinois, and the district aforesaid, and the defendants in this suit, of a plea, wherefore the defendants took the goods and chattels of the plaintiff, and unjustly detained the same against sureties and pledges, etc.

For that the defendants, to wit, on the 2d day of January, A. D. 1873, to wit, at the district aforesaid, took the goods and chattels of the plaintiff, to wit, two locomotive-engines of the plaintiff, named, respectively, the Olney No. 1 and the Alfred N. Smyser No. 3, each of said locomotives being of great value, to wit, of the value of $12,000, and unjustly detained the same against sureties and pledges, etc., until, etc. And, also, wherefore the defendants unjustly detain the goods and chattels of the plaintiff, against sureties and pledges, etc., until etc., for that the defendants, on the 22d day of January, to wit, at the district aforesaid, the goods and chattels of the plaintiff, to wit, two locomotive-engines of the
11 plaintiff, named, respectively, the Olney No. 1 and the Alfred N. Smyser *Smyser* No. 3, each of said locomotives then and there being of great value, to wit, of the value of $12,000, and unjustly detained the same, against sureties and pledges, &c., until, etc. Wherefore the said plaintiff saith it is injured and hath sustained damage to the amount of $500, and therefore it brings its suit by—

HAY, GREEN & LITTLER,
Plff.s Attys.

(Endorsed:) Filed May 13th, A. D. 1873. J. A. Jones, clerk.

Now, afterwards, to wit, on the third day of June, in the June term of said court of the year aforesaid, the following proceedings were had in said court in said cause, and entered of record, to wit:

Leave to plead.

RHODE ISLAND LOCOMOTIVE WORKS
vs.
ROBERT I. HERVEY ET AL. } In replevin.

On motion of defendants, by James A. Eads, esq., their attorney,

leave is granted them to plead herein by Monday, the 16' day of June inst.

Then afterwards, to wit, on the fourth day of June of the year aforesaid, came the defendant, by its said attorneys, and filed in said clerk's office its pleas herein; which said pleas are in the words and figures following, to wit:

Pleas.

In the circuit court of the United States for the southern district of Illinois of the June term, 1873.

THE RHODE ISLAND LOCOMOTIVE WORKS
vs.
ROBERT G. HERVEY AND THE PARIS AND DECATUR RAILROAD COMPANY. } Replevin.

12 And the defendants, by Ingersoll, Puterbaugh Bros. & McCune, their attorneys, come and defend the wrong and injury, when, etc., and say that they did not take the goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof complained against them; and of this the defendants put themselves upon the country, etc.

By Eads:

INGERSOLL, PUTERBAUGH BROS., & McCUNE,
Attorneys for Defendant.

And for a further plea in this behalf, the defendants say they did not wrongfully detain the goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff has above thereof complained against them; and of this the defendants put themselves upon the country, etc.

By Eads:

INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Attys. for Defts.

And for a further plea in this behalf, the defendants say action on, because they say that there is not, nor was at the time of the commencement of this suit, any such corporation as the Rhode Island Lo-
13 comotive Works, as by the said declaration is above supposed; and of this the defendants put themselves upon the country, etc.

By Eads:

INGERSOLL, PUTERBAUGH BROS. & McCUNE,
Their Attorneys.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have its aforesaid against action them, the defendants, because they say that the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of them, the defendants, and not of the plaintiff, as by the said declaration is above supposed, and this the defendants are ready to verify; wherefore they pray judgment, etc.

By James A. Eads:

INGERSOLL, PUTERBAUGH BROS., AND McCUNE,
Their Attorneys.

And for a further plea in this behalf, the defendants say that the

plaintiff ought not to have its aforesaid action against them, the defendants, because they say that the said goods and chattels in the said declaration mentioned, at the said time, when, etc., were the property of the defendant, the Paris and Decatur Railroad Company, and not of the plaintiff, as, by the said declaration is above supposed, and
14 this the defendants are ready to verify; wherefore they pray judgment, etc.

By INGERSOLL, PUTERBAUGH BROS., AND McCUNE,
Their Attys.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have or maintain its af'd action against them, the defendants, because they say that the said goods and chattels, in the said declaration mentioned, at the said time, when, etc., were the property of the Chicago and Illinois Southern Railroad Company, and not of the said plaintiff, as is by the said declaration supposed, and this the said defendants are ready to verify; wherefore they pray judgment, etc.

By EADS, INGERSOLL, PUTERBAUGH BROS., & McCUNE,
Their Attys.

And for a further plea in this behalf, the defendants say that the plaintiff ought not to have its aforesaid action against them, the defendants, because they say that the said goods and chattels in the said declaration mentioned, at the said time, when, etc., were the property of the defendant, Robert G. Hervey, and not of the plaintiff, as
15 by the said declaration is above supposed, and this the defendants are ready to verify; wherefore they pray judgment, etc.

By INGERSOLL, PUTERBAUGH BROS., & McCUNE,
Their Attorneys.

(Endorsed:) Filed June 4th, 1873. J. A. Jones, clerk.

Afterwards, to wit, on the twenty-fourth day of said June, in the term & year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order for hearing.

RHODE ISLAND LOCOMOTIVE WORKS
vs.
ROBERT G. HERVEY ET AL. } In replevin.

This day came the parties, by their attorneys, and, by consent, this cause is set for hearing on Thursday, the 26th day of June 1*st*.

Now, afterwards, to wit, on the first day of said July, in the term and year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order to reduce testimony to writing.

RHODE ISLAND LOCOMOTIVE WORKS
16 *v.*
ROBERT G. HERVEY ET AL. } In replevin.

This day came the parties, by their attorneys, and, by consent, the

evidence this day heard is to be reduced to writing, and this cause continued at cost of defendants.

It is therefore ordered and adjudged that the plaintiff recover of the defendants the costs and charges by it about its suit at this term expended, and that it have execution therefor.

Then, afterwards, to wit, on the seventeenth day of October, in the October adjourned term of said court, of the year aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of continuance.—October T., '73.

RHODE ISLAND LOCOMOTIVE WORKS
v.
ROBERT G. HERVEY ET AL. } Replevin.

It is ordered by the court that this cause be continued.

Now, afterwards, to wit, on the seventh day of January, of the January term of said court, in the year of our Lord one thousand eight hundred and seventy-four, the following further proceedings were
17 had in said court in said cause, and entered of record, to wit:

Order for hearing.

RHODE ISLAND LOCOMOTIVE WORKS
v.
ROBERT G. HERVEY ET AL. } Replevin.

This day came the parties, by their attorneys, and by consent this cause is set for hearing on Wednesday, the 21st day of January inst.

Afterwards, to wit, on the twenty-first of said January, of the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Order of continuance.—Jan'y T., '74.

RHODE ISLAND LOCOMOTIVE WORKS
v.
ROBERT G. HERVEY ET AL. } Replevin.

By consent of parties, by their attorneys, this cause is continued.

And afterwards, to wit, on twelfth day of said June, in the June term of said court, and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Trial by court.

RHODE ISLAND LOCOMOTIVE WORKS
v.
18 ROBT. G. HERVEY AND THE PARIS & Decatur Railroad Company. } Replevin.

This day comes as well the plaintiff, by Messrs. Hay, Green & Littler, its attorneys, as the defendants, by J. A. Eads, esq., and R. I. Ingersoll,

esq., their attorneys, and the issue joined by consent is tried by the court, a jury being waived; and the court having heard the evidence and argument of counsel, takes the same under advisement.

Afterwards, to wit, on the fifteenth day of said June, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Judgment.

RHODE ISLAND LOCOMOTIVE WORKS, *v.* ROBERT G. HERVEY AND THE PARIS & DECATUR RAILROAD COMPANY. } Replevin.

This day come again the parties, by their attorneys, and the court, being now sufficiently advised in the premises, finds the issue for the
19 plaintiff, and that the defendants did wrongfully detain the goods and chattels in the declaration mentioned, to wit, two locomotive-engines, named, respectively, the Olney No. 1, and the Alfred M. Smyser No. 3.

It is therefore ordered and adjudged by the court, that the plaintiff recover of the defendant its damages aforesaid assessed, together with the sum of dollars and cents, its costs and charges by it about its suit in this behalf expended, and that execution issue therefor. Whereupon defendants tender their bill of exceptions; which is signed, sealed, and ordered by the court to be made part of the record herein.

Bill of exceptions.

UNITED STATES OF AMERICA,
Southern District of Illinois:

United States circuit court, June term, A. D. 1874.

RHODE ISLAND LOCOMOTIVE WORKS *vs.* ROBERT G. HERVEY & THE PARIS & DECATUR RAILROAD COMPANY.

20 Be it remembered that on the trial of this cause the plaintiff, to sustain the issue on his part, offered in evidence the following contracts or written agreements, to wit:

Agreement between plff. and Conant & Co.

This agreement, made this thirteenth day of September, eighteen hundred and seventy-one, by and between the Rhode Island Locomotive Works, of Providence, R. I., party of the first part, and J. Edwin Conant & Co., contractors for the Chicago and Illinois Southern Railroad Company, party of the second part, witnesseth:

That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Olney No. 4; and whereas the said party of the second part is desirous of using, and eventually purchasing, the same: Now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second

part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of the first part the said one locomotive-engine and tender, with the right to
21 place the same upon its railroad, and to use the same in the usual manner in transacting the business of the said railroad; and in consideration thereof the said party of the second part hereby covenants and agrees to pay the said party of the first part, for the use and rent of the same, the sum of twelve thousand ninety-three & $\frac{96}{100}$ dollars, in notes, as follows:

10 % cash	1,150 00
One note due March 16, 1872	3,580 16
One " " June 16, 1872	3,647 90
One " " September 16, 1872	3,715 90
	$12,093 96

And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collision, by running off the track, or by fire, or destruction from any cause, is not to be considered reasonable and ordinary wear and tear. And the said party of the first part, in consideration of the foregoing, further covenants and agrees that, in case the said party of the second part shall pay the said notes promptly,
22 as hereinbefore set forth, upon payment of the last-mentioned note, viz, thirty-seven hundred fifteen & $\frac{90}{100}$ dollars, and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of the second part, its legal representatives, successors, & assigns, forever.

And the said party of the second part further covenants and agrees that, if it shall fail to make any of the said payment' when due, then the said party of the first part shall be at liberty and it shall be lawful for it to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of the said party of the second part. And the said party of the second part further covenants and agrees that, in case of any default on its part in any of the payments as hereinbefore provided, it will, within thirty days thereafter, deliver the said on' locomotive-engine and tender to the said party of the first part, and the said party of the first part shall thereafter, upon thirty days' written notice to the said party of
23 second part of the time and place of sale, proceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sale, first, to the payment of the expenses of the sale; second, to the payment of any balance then due or thereafter to become due for or on account of the rent, as hereinbefore provided; and if, after these payments, there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, en-

cumber, or in any way dispose of said one locomotive-engine and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., or in any way or manner interfere with the said party of the first part in repossessing and retaking said one locomotive-engine and tender should default be made in any of the hereinbefore-provided-for payments, but the full, legal right and title of said on' locomotive-engine and tender shall and does remain in
24 the Rhode Island Locomotive Works as fully, to all intents and purposes, as though the lease had not been made.

And the said party of the first part hereby covenants and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the times hereinbefore specified, without any let, or hindrance, or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz, thirty-seven hundred fifteen & $\frac{90}{100}$ dollars, and all renewals, being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part and give them a full acquittance for the same, and that the title thereto shall, ipso facto, by the completion of such payment, vest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Company.

In witness whereof the parties hereto have hereunto set the corporate seal by the respective officers duly authorized.

RHODE ISLAND LOCOMOTIVE WORKS.
EDW. P. MASON,
Treasurer.

RHODE ISLAND LOCOMOTIVE WORKS, SEAL, PROVIDENCE, R. I.

J. EDWIN CONANT & CO.

(Endorsed :)

(Endorsed :) Filed Jan'y 15, 1873, at 2 o'clock p. m., & recorded in book of deeds No. 35, and pages 312 & 313.

A. H. CHAPMAN,
Recorder.

(Also endorsed :) Filed June 15, A. D. 1874.

J. A. JONES, *Clerk.*

25 *Agreement between plff. & Conant & Co.*

This agreement, made this twenty-first day of August, eighteen hundred and seventy-one, by and between the Rhode Island Locomotive Works of Providence, R. I., party of the first part, and J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co., party of the second part, witnesseth :

That whereas the said party of the first part is the owner of one locomotive-engine and tender complete, named Alfred N. Smyser No. 3, and whereas the said party of the second part is desirous of using and eventually purchasing the same; now, therefore, in consideration of the sum of one dollar to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained, the said party of the first part agrees to let and lease, and hereby does let and lease, to the said party of the second part, and the said party of the second part agrees to have and take from the said party of

the first part, the said one locomotive-engine and tender, with the right to place the same upon its railroad and to use the same in the
26 usual manner in transacting the business of the said railroad, and in consideration thereof the said party of the second part hereby covenants and agrees to pay to the said party of the first part for the use and rent of the same the sum of twelve thousand ninety-three dollars & $\frac{96}{100}$ in notes, as follows:

10 % cash	1,150 00
One note due February 24th, 1872	3,580 16
One " " May 24, 1872	3,647 90
One " " August 24, 1872	3,715 90
	$12,093 96

And the said party of the second part hereby further covenants and agrees, during the time hereby demised, to keep and maintain the said one locomotive-engine and tender in as good condition as it now is, reasonable and ordinary wear and tear excepted; but it is understood and agreed that any injury by collision, by running off the track, or by fire, or by destruction from any cause, is not to be considered reasonable and ordinary wear and tear.

And the said party of the first part, in consideration of the foregoing, further covenants and agrees that in case said party of the second part shall pay the said notes promptly as hereinbefore set forth, upon
27 payment of the last-mentioned note, viz, thirty-seven hundred fifteen & $\frac{90}{100}$ dollars and all renewals of same, it will grant, sell, assign, transfer, and convey to the said party of the second part the said one locomotive-engine and tender in the condition it then is, to have and to hold the same to the said party of the second part, its legal representatives, successors, and assigns forever. And the said party of the second part further covenants and agrees that if it shall fail to make any of the said payment' when due, then the said party of the first part shall be at liberty, and it shall be lawful for it to enter upon and take possession of the said one locomotive-engine and tender, and to that end to enter upon the road and other property of said party of the second part.

And the said party of the second part further covenants and agrees that, in case of any default on its part in any of the payments, as hereinbefore provided, it will within thirty days thereafter deliver the said one locomotive-engine and tender to the said party of the first part.

And the said party of the first part shall thereafter, upon thirty days' written notice to the said party of the second part of the times
28 and place of sale, p'oceed to sell the said one locomotive-engine and tender, and shall apply the proceeds of such sales, first, to the payment of the expenses of the sale; second, to the payment of any balance the*ir* due or thereafter to become due, for or on account of the rent, as hereinbefore provided; and if after these payments there shall remain any balance of the proceeds of the sale, the same shall be paid to the said party of the second part.

And the said party of the second part further covenants and agrees that they will not in any way exercise or claim the right to release, encumber, or in any way dispose of said one locomotive-engine and tender, or employ them during the term of this lease in any other way than in the service of J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern R. R. Co., or in any way or manner interfere with the

said party of the first part in repossessing and retaking said one locomotive-engine and tender, should default be made in any of the hereinbefore provided for payments, but the full legal right and title of said one locomotive-engine and tender shall and does remain in the Rhode Island Locomotive Works, as fully, to all intents and pur-
29 poses, as though the lease had not been made.

And the said party of the first part hereby covenants and agrees that if the said party of the second part shall and do well and truly make each of the payments aforesaid at the times hereinbefore specified, without any let or hindrance or delay whatever as to any or either of said payments, that upon the last-mentioned payment, viz, thirty-seven hundred fifteen & $\frac{90}{100}$ dollars, and all renewals being made, as well as each and all of the other said payments, the said party of the first part will and shall convey the said one locomotive-engine and tender to the said party of the second part, and give them a full acquittance for the same, and that the title thereto shall, ipso facto, by the completion of such payment, vest in the said J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern Railroad Co.

In witness whereof the parties hereto have hereunto set the corporate seal, by the respective officers duly authorized.

RHODE ISLAND LOCOMOTIVE WORKS.
EDW. P. MASON, *Treasurer.*
J. EDWIN CONANT & CO.,
Contractor C. & Ill. So. R. R.

SEAL RHODE ISLAND LOCOMOTIVE WORKS, PROVIDENCE, R. I.

30 (Endorsed:)

STATE OF ILLINOIS, *Cumberland County:*

I hereby certify that the within instrument was filed in this office for record, on the 28' day of January, 1873, at 2 o'clock p. m., and duly recorded in book D of mortgage', page 485, and examined.

ANDREW CARSON,
Clerk and Ex-Officio Recorder.

(Also endosed:) Filed June 15, A. D. 1874. J. A. Jones, clerk.

It was also admitted by the parties to this suit that Conant & Co. paid no part of the principal of the purchase-money, except the amount admitted on the face of the contract, the same being the sum of one thousand dollars, and that Conant and Company obtained possession of said engine & tender under said agreement. It was further admitted that the plaintiff was & is a duly-organized corporation under the laws of Rhode Island, the agreements referred were executed by the plaintiff in Rhode Island, where it did business, and were then sent to Co-
31 nant Bro., in New York, where they resided, & were returned executed by them to Rhode Island, they having been sent for that purpose.

This was all the evidence offered by the plaintiff in chief.

Testimony of Virgil Curd.

The defendants, to sustain the issue upon their part, introduced one Virgil Curd, who testified that he was deputy sheriff of Coles County, Illinois, and as such sold the engine & tender Alfred A. Smyser on a special execution, as shown by the record introduced herein, sold in Mattoon, Coles Co., Ills., and that the engine & tender was present, sold at public sale after being duly advertised; sold the Smyser to Dale for Able Reed & Co. for $1,000. Defendant then introduced the following record:

Record from Coles County.

In circuit court, October term, A. D. 1872.

UNITED STATES OF AMERICA,
State of Illinois, Coles County, ss:

Pleas before the honorable James Steele, judge of the 27th judicial circuit of the State of Illinois, and sole presiding judge of the circuit court of Coles County, in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Charleston, in said county, on the fifth Tuesday (being the twenty-ninth day) of Octo-
32 ber, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-sixth.

Present, honorable James Steele, judge of the 27th judicial circuit of the State of Illinois; John Boyle, State's attorney; Allen M. Brown, sheriff.

Attest:

HENRY C. WORTHAM, *Clerk.*

Be it remembered that heretofore, to wit, on the ninth day of April, in the year last aforesaid, there was filed in the office of the clerk of the circuit court aforesaid a certain transcript of proceedings, in the words and figures following, to wit:

In the common pleas court of the city of Mattoon, February term, A. D. 1872.

STATE OF ILLINOIS,
Coles County, City of Mattoon:

MELVILLE B. ABELL, JACOB O. RUDY, & Stephen D. Dole
vs.
J. EDWIN CONANT AND WILLIAM M. AVERY.

} Action of assumpsit. Damages, three thousand dollars.

The clerk of said court will please issue summons, returnable as above, and oblige,

JAMES W. CRAIG,
Atty. for Plff.

To H. C. WORTHAM,
Clerk of said Court.

33 STATE OF ILLINOIS,
Coles County, City of Mattoon, ss:

The people of the State of Illinois to the sheriff of Coles County, greeting:

We command you that you summons J. Edwin Conant and William M. Avery, if to be found in your county, to be and appear before the common pleas court of the city of Mattoon, on the first day of the next term thereof, to be holden in said city on the 5th day of February, 1872, to answer Melville B. Abell, Jacob O. Rudy, and Stephen D. Cole, partners under firm-name of Abell, Rudy & Co., of a plea of assumpsit. Damages, $3,000.

Witness H. Clay Wortham, clerk of said court, and the judicial seal thereof, at Mattoon, this 26th day of Oct., A. D. 1871.

[SEAL.] H. C. WORTHAM, *Clerk*,
By C. B. BOSTWICK, *Deputy*.

In the common pleas court of said city of Mattoon, February term, A. D. 1872.

STATE OF ILLINOIS,
Coles County, City of Mattoon:

34 MELVILLE B. ABELL, JACOB O. RUDY, Stephen D. Dale
vs.
J. EDWIN CONANT & WILLIAM M. AVERY. } Assumpsit.

The said Melville B. Abell, agent for plaintiffs, being duly sworn, deposes and says that the above-entitled action of assumpsit was commenced in said court by summons, and is still pending and undetermined in said court; that the cause of action sued upon therein is for acceptances & money paid out by plaintiffs for use of defendants at their request, and the whole thing amounts to three thousand dollars, and that said J. Edwin Conant & William M. Avery are now residents of the State of Illinois. He therefore prays that an attachment may issue in aid of the said suit at law, &c.

MELVILLE B. ABELL.

Subscribed and sworn to before me this 26th day of Oct., 1871.
H. C. WORTHAM, *Clerk*,
By C. B. BOSTWICK, *Depty*.

35 Know all men by these presents that we, Melville B. Abell S. D. Dale, are held and firmly bound unto J. Edwin Conant & William M. Avery in the penal sum of six thousand dollars and cents, lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 26' day of October, 1871.

The condition of the above obligation is such, that whereas there is now pending and undetermined in the common pleas court in and for the city of Mattoon, county of Coles, in the State of Illinois, a certain action of assumpsit, wherein the said Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale are plaintiffs, and J. Edwin Conant & William Avery are defendants; and whereas the above bo'nden Melville B. Abell has, on the day of the date hereof, prayed an attachment out of the said circuit court, at the suit of the said Melville B. Abell, against the estate of the above-named J. Edwin Conant & William M. Avery, in aid
36 of the said suit at law for the sum of three thousand dollars and cents, and the same being about to be sued out of said court, returnable on the first Monday of February, A. D. 1873, to the term of the said court then to be holden: Now, if the said plaintiffs shall prosecute their said suit with effect, and the said attachment shall not be dissolved, or in case of failure in such suit, or the dissolution of such attachment, shall well and truly pay and satisfy the said J. Edwin Conant & William M. Avery all such costs in said suit, and such damages as shall be awarded against the said Melville B. Abell, Jacob O.

Rudy & Stephen D. Dale, heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

MELVILLE B. ABELL. [SEAL.]
S. D. DALE. [SEAL.]
[SEAL.]
[SEAL.]

STATE OF ILLINOIS,
Coles County, City of Mattoon, ss:

37 The people of the State of Illinois to the sheriff of Coles County, greeting:

Whereas Melville B. Abell, one of the firm of Abell, Rudy & Co., said firm consisting of said Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale, hath complained on oath before me, the undersigned, clerk of the common pleas court in and for said city, that J. Edwin Conant and William McAvery, partners under the firm-name of J. Edwin Conant & Co., is justly indebted to the said Melville B. Abell, Jacob O. Rudy, and Stephen D. Dole, partners under the aforesaid firm-name of Abell, Ruby & Co., to the amount of three thousand dollars and cents, and oath having been made that the said J. Edwin Conant and William M. Avery are not residents of the State of Illinois, and the said Melville B. Abell, one of the firm aforesaid, having given bond and security, according to the directions of the several acts of the legislature in such case made and provided, we therefore command you that you attach so much of the estate, real or personal, rights and credits, moneys
38 and effects, of the said J. Edwin Conant and William M. Avery, partners as aforesaid, to be found in said city, as shall be of sufficient value to satisfy the said debt and cost, according to the complaint, and such estate so attached on your hands to secure or so to provide that the same may be liable to further proceedings thereupon, according to law, at the next term of the common pleas court for said city, to be holden in Mattoon on the 5th day of February, 1872, so as to compel the said J. Edwin Conant and William M. Avery, partners as aforesaid, to appear and answer the complaint of the said Melville B. Abell, one of the firm of Abell, Rudy & Co., aforesaid, for & in behalf of the said firm; and also that you summon to be and appear at the said term of the court as garnishee, then and there to answer what may be objected against them, and have you then and there this writ.

Witness H. Clay Wortham, clerk of said court, at Mattoon, this 26th day of October, 1870.

[SEAL.]

H. CLAY WORTHAM, *Clerk.*
By C. B. BOSTWICK, *Deputy.*

39 *Return.*

OCTOBER 28th, 1871.—By virtue of the within writ of attachment, I have this day levied upon the following property, to wit, one locomotive-engine, knowing as the A. N. Smyser, as the property of the within-named defendants.

N. M. BROWN, *S. C. C.*,
By J. J. BEALL, *Dep.* "

Levy, 50; mileage, 20; ret., 10; help, 105.00.

In the common pleas court of the city of Mattoon, February term, A. D. 1872.

STATE OF ILLINOIS,
Coles County, City of Mattoon:

Melville B. Abell, John O. Rudy, and Stephen D. Dole, partners under the firm-name and style of Abell, Rudy & Co., plaintiffs in this suit, complain of J. Edwin Conant and William M. Avery, partners under the firm-name and style of J. Edwin Conant & Co., of a plea of trespass on the case on promises, for that, whereas, one J. B. Ayer, under the name & style of J. B. Ayer, genl. supt., heretofore, to wit, on the twenty-eighth day of August, in the year A. D. 1870, at Mattoon, Ills., to wit, the city of Mattoon, Coles County, Illi-
40 nois, made his certain bill of exchange, in writing, bearing date the day and year aforesaid, and thereby then and there requested the defendants, under the name and style of Edwin J. Conant & Co., fifteen days after sight thereof, to pay to the order of the plaintiff, under the name and style of Farmers & Merchants' Bank, the sum of one thousand dollars, and delivered said bill of exchange to the plaintiff; which said bill of exchange the defendants afterwards, to wit, on, to wit, the thirty-first day of August, A. D. 1871, at New York, the city, county, and State aforesaid, upon sight thereof, accepted and made payable at the Ocean National Bank by said defendants.

And the plaintiff avers that, afterwards, and when said bill of exchange became due and payable according to the tenor and effect thereof, to wit, at the Ocean National Bank at, to wit, time & place aforesaid, the said bill of exchange was duly presented for payment thereof, and the payment of the said sum of money was then and there duly re-
41 quested, but the defendants, nor any other person, did, or would, when *when* the said bill was so presented and shown for payment as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said several promises the defendant afterwards, to wit, on the day and year last aforesaid, at, to wit, time & place aforesaid, had notice, by means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money in said bill of exchange specified, when the defendant should be requested, and being so liable, they, the defendant, in consideration thereof, afterwards, to wit, on the and year last aforesaid, promised the plaintiff to pay him the said sum of money in the said bill of exchange specified when they, the defendants, should be thereunto afterwards requested,

And also, that, whereas, one J. B. Ayer, under the name and style of J. B. Ayer, genl. supt., heretofore, to wit, on the thirteenth day
42 of September, at Mattoon, Ills., to wit, the city of Mattoon, Coles County, Illinois, made his certain bill of exhange, in writing, bearing date the day and year aforesaid, and thereby, then and there, requested the defendants, under the name and style of J. Edwin Conant & Co., ten days after sight thereof, to pay to the order of the plaintiffs, under name and style of Farmers & Merchants' Bank, the sum of one thousand dollars, and delivered the said bill of exchange to the plaintiff, which said bill of exchange the defendants, afterwards, at New York, to wit, county, city, & State aforesaid, to wit, on, to wit, the sixteenth day of September, in the year of our Lord one thousand eight hundred and seventy-one, upon sight thereof, accepted and made the same payable by said acceptance at the Ocean National Bank.

And the plaintiff avers that afterward, and when the said bill of exchange became due and payable according to the tenor and effect thereof, afterward, to wit, on day & year aforesaid, the said bill of exchange was duly presented for payment thereof, and payment of the said
43 sum of money was then and there duly requested, but the defendant, nor any other person, did, or would, when the said bill was so presented and shown for payment, as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do, of all which said several promises the defendants afterwards, to wit, at time & place aforesaid, had notice, by means whereof the defendant then and there had notice, by means whereof the defendant then and there became liable to pay to the plaintiff the said sum of money in the said bill of exchange specified when the defendant should be requested, and being so liable, he, the defendant, in consideration thereof, afterward, at time and place aforesaid, promised the plaintiff to pay them the said sum of money in the said bill of exchange specified, when they, the defendants, should be requested.

And also, for that, whereas, also, one J. B. Ayer, under the name & style of J. B. Ayer, genl. supt., heretofore, on, to wit, the thirteenth
44 day of September, in the year of our Lord one thousand eight hundred & seventy-one, at Mattoon, Ills., to wit, the city of Mattoon, Coles County, Illinois, made his certain bill of exchange, in writing, bearing date the day and year aforesaid, and thereby then and there requested the defendants, under the name & style of J. Edwin Conant & Co., fifteen days after sight thereof, to pay to the order of plaintiffs, under the name & style of Farmers and Merchants' Bank, the sum of one thousand dollars, and delivered the said bill of exchange to the plaintiffs, which said bill of exchange the defendants afterwards, at New York, to wit, city, county, & State aforesaid, on, to wit, September the sixteenth, in the year of our Lord one thousand eight hundred and seventy-one, upon sight thereof accepted, and made the same payable at the Ocean National Bank.

And the plaintiff avers that afterwards, and when the said bill of exchange became due and payable according to the tenor and effect thereof, to wit, time and place aforesaid, the said bill of exchange was duly presented for payment thereof, and payment of the said sum of money was then and there duly requested, but the defendant, nor
45 any other person, did, or would, when the said bill was so presented and shown for payment, as aforesaid, or at any time before or afterwards, pay the sums of money therein specified, or any part thereof, but then and there wholly neglected and refused so to do; of all which said several promises the defendants, to wit, time & place aforesaid, had notice, by means whereof the defendant then and there became liable to pay to the plaintiffs the said sum of money in said bill of exchange specified when the defendants should be requested, and being so liable, they, the defendants, in consideration thereof, on time & place aforesaid, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, promised the plaintiffs to pay them the said sum of money in said bill of exchange specified, when they, the defendants, should be thereunto afterwards requested.

And also, for that, whereas, the defendants, on, to wit, the 25th day of October, A. D. 1871, at, to wit, the city of Mattoon, Coles County, Illinois, the defendants were and still are indebted to the plaintiffs
46 in the sum of three thousand dollars, for money before that time paid, laid out, and expended by the plaintiffs for the use of the

defendants at their request; and in the sum of three thousand dollars, for so much money before that time lent and accommodated by the plaintiffs to the defendants at their request; and in the sum of three thousand dollars, for so much money before that time had and received by the defendants to the use of the plaintiffs.

And in the sum of three thousand dollars, for money found to be due from the defendants to the plaintiffs, on an account then and there stated between them; and in the sum of three thousand dollars for so much money before that time due from the defendants to the plaintiffs, for interest upon and for forbearance of divers large sums of money before then due from defendants to the plaintiffs, and by the plaintiffs forbore to the defendants for long spaces of time before then elapsed, at the request of the defendants; whereby the defendants became liable to pay plaintiffs the said several sums of money in the said several
47 counts in plaintiffs' declaration mentioned, when they should be requested.

And the defendants afterwards, to wit, time & place aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money to the plaintiffs, on request; yet the defendants has not, though often requested, paid the said several sums of money, no' either of them, or any part thereof, to the damage of the plaintiffs of three thousand dollars, wherefore they bring suit.

By CRAIG & CLARK,
Their Attorneys.

38.—*Instrument sued on.*

$1,000.] MATTOON, ILLS., *August 28th*, 1871.

GD. (15) Fifteen days after sight pay to the order of Farmers' & Merchants' Bank one thousand dollars, value received, and charge to account of—

J. B. AYER,
Gen'l Supt.

To J. EDWIN CONANT & CO.,
33 *Wall st., New York.*

(Written across the face in red ink:)

SEPT. 18.

Accepted, New York, August 31, 1871.
Payable at the Ocean National Bank.
J. EDWIN CONANT & CO.

[50-ct. int. rev. stamp, canceled. J. E. C. & Co.]

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

48 On the eighteenth day of September, 1871, at the request of the Ocean National Bank of New York, I, John H. Price, a notary public of the State of New York, duly commissioned and sworn, did present the original draft or bill of exchange hereto annexed to the paying-teller of the Ocean National Bank, and demanded payment, who refused to pay the same. Whereupon I, the said notary, at the request aforesaid, did present, and by these presents do publicly and solemnly protest, as well against the drawer and endorsers of the said draft or bill, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, and interest already incurred, and to be hereafter incurred, for want of payment of the same.

Thus done and protested, in the city New York, aforesaid, in the pre'nce of John Doe and Richard Roe, witnesses.

In testimonium veritalis.

[SEAL.] JOHN H. PRICE,
Notary Public.

[25-ct. int. rev. stamp, canceled. W. S. Sir., Sept. 18, 1871.]

49 No. 39.—*Instrument sued on.*

$1,000.] MATTOON, ILLS., *September* 13*th*, 1871.

GD. Ten days after sight pay to the order of Farmers' & Merchants' Bank one thousand dollars, value received, and charge to account of—

J. B. AYER,
Gen'l Supt.

To J. EDWIN CONANT & Co.,
33 *Wall st., New York.*

(Written across the face in red ink:)
Accepted, New York, September 16, '71.
Payable at the Ocean National Bank.

J. EDWIN CONANT & CO.

[50-ct. int. rev. stamp.]

UNITED STATES OF AMERICA,
State of New York, City & County of New York, ss:

On the twenty-ninth day of September, 1871, at the request of the Ocean National Bank of the city of New York, I, R. W. Todd, a notary public of the State of New York, duly commissioned and sworn, did present the original draft, hereto annexed, to the paying-teller of the Ocean National Bank, New York, and demanded payment, who refused to pay the same. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawer and endorser of the said draft as
50 against all others whom it doth or may concern, for exchange, re-exchange, and all costs, charges, and interest already incurred, or to be hereafter incurred, for want of non-payment of the same.

Thus done and protested, in the city of New York aforesaid, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritalis.

[SEAL.] R. W. TODD,
Notary Public.

[25-ct. int. rev. stamp, canceled, Sept., 1871.]

No. 40.—*Instrument sued on.*

$1,000.] MATTOON, ILLS., *September* 13*th*, 1871.

GD. Fifteen days after sight, pay to the order of Farmers' & Merchants' Bank one thousand dollars, value received, and charge to account of—

J. B. AYER,
Gen'l Supt.

J. EDWIN CONANT & Co.,
33 *Wall st., New York.*

(Written across the face in red ink:)
Accepted, New York, September 16, '71.
Payable at the Ocean National Bank.

[50-ct. int. rev. stamp.]

UNITED STATES OF AMERICA,
State of New York, ss:

On the 4th day of October, in the year of our Lord one thousand eight hundred and seventy-one, at the request of the Ocean National
51 Bank, of the city of New York, I, S. Douglas Smith, a notary public, duly commissioned and sworn, dwelling in the city of New York, did present the original bill of exchange or draft hereunto annexed to the paying-teller of the Ocean National Bank, said bank New York City, and demanded of him payment thereof, which he refused, saying . Whereupon I, the said notary, at the request aforesaid, did protest, and by these *these* presents do publicly and solemnly protest, as well against the drawer, acceptor, and endorser of said bill of exchange or draft as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred for want of payment of the said bill of exchange or draft.

Thus done and protested, in the city of New York aforesaid, on said day and year, in the presence of John Doe and Richard Roe, witnesses.

In testimonium veritalis.

[SEAL.] S. DOUGLAS SMITH,
Notary Public.

[25-ct. int. rev. stamp, canceled. S. D. A., O. 4, '71.]

52 *Copy of account sued on.*

J. Edwin Conant and William M. Avery to Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale, Dr.

To money paid, lent out, & expended	$3,000
To money lent & accommodated	3,000
To money had and received to use of pl'ffs	3,000
To money found to be do on account stated	3,000
To money for interest upon & forbearance	3,000

In the common pleas court of the city of Mattoon, Feb. term, A. D. 1872.

STATE OF ILLINOIS,
Coles County, City of Mattoon, ss:

MELVILLE B. ABELL, JACOB O. RUDY, AND Stephen D. Dale, partners under firm-name of Abell, Rudy & Co.,
vs.
J. EDWIN CONANT & WILLIAM M. AVERY, partners, &c. } Assumpsit.

George H. Chapman, being duly sworn, on oath says that he is
53 the agent of J. Edwin Conant & William M. Avery, the defendants in the above-entitled cause; that said defendants are now both absent from the city of Mattoon; that neither of said defendants resided within the corporate limits of the city of Mattoon at the time of the commencement of this suit, nor have they, either of them, resided within said corporate limits of the said city of Mattoon from thence hitherto, nor do they or either of them now reside within the corporate limits of said city of Mattoon, but that, on the contrary, the said de-

fendants, at the time of the commencement of this suit, resided beyond the corporate limits of the city of Mattoon, & from thence up to the present time have continued to reside beyond the corporate limits of said city, & still reside beyond the corporate limits of said city; that the said Conant resides in the State of New Jersey and the said Avery in the State of New York; and that this affidavit is made for the purpose of obtaining a change of the venue of said cause from the common pleas court of the city of Mattoon to the circuit court of Coles
54 County, according to the statute in such case made and provided.

GEO. H. CHAPMAN.

Subscribed and sworn to before me this 6th day of Febry., A. D. 1872.

H. C. WORTHAM, *Clk*,
By C. B. BOSTWICK, *Dpty.*

In the common pleas court of the city of Mattoon, Feb'y term, A. D. 1872.

STATE OF ILLINOIS,
Coles County, City of Mattoon :

MELVILLE B. ABELL, JACOB O. RUDY, AND Stephen D. Dale, partners under the firm-name of Abell, Rudy & Co.,
vs.
J. EDWIN CONANT AND WILLIAM M. AVERY, partners, &c.
} Assumpsit.

And now come the defendants, J. Edwin Conant & William M. Avery, in the above-entitled cause, by Charles Bennett, their at-
55 torney, and enters their appearance in said cause, and prays that the venue of said cause be changed to the circuit court of Coles County, for the reason that said defendants reside beyond the corporate limits of the city of Mattoon, as appears by the affidavit of George H. Chapman, agent of said defendants, filed herewith.

By CHAS. BENNETT,
Atty for Defendants.

Attachment notice.

Common pleas court of the city of Mattoon, February term, 1873.

STATE OF ILLINOIS,
County of Cole, City of Mattoon, ss :

MELVILLE B. ABELL, JACOB O. RUDY, STEPHEN D. Dale, partners under the firm-name of Abell, Rudy & Co.,
vs.
J. EDWIN CONANT, WILLIAM M. AVERY, PARTNERS under the firm-name of J. Edwin Conant & Co.
} In attachment in aid of suit at law.

56 Notice is hereby given to you, the said J. Edwin Conant and William M. Avery, partners under the firm-name of J. Edwin Conant & Co., that a writ of attachment in aid of a suit at law was issued

out of the office of the clerk of said court, on the 26th day of October, A. D. 1871, in favor of Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale, partners under the firm-name of Abell, Rudy & Co., in the sum of three thousand dollars, ($3,000,) returnable to the February term of said court, A. D. 1872, against the estate, real & personal, rights and credits, moneys and effects of the said J. Edwin Comant and William M. Avery, partners as aforesaid, which said writ has been returned by the sheriff of said Coles County, levied upon the following property, to wit: One locomotive-engine known as the "A. M. Smyser." Now, unless you, the said J. Edwin Conant and William M. Avery, shall personally be and appear on the first day of the next term of said court to be holden in the city of Mattoon on the first Monday in the month of Feb-
57 ruary, A. D. 1872, and give bail and plead in said cause, judgment will be entered against you in said cause, and the property attached sold to satisfy the same.

H. C. WORTHAM, *Clerk*,
By C. B. BOSTWICK, *Deputy*.

JAMES W. CRAIG,
HORACE S. CLARK,
Plff. Attys.

MATTOON, ILLS., *Feb'y 6th*, 1872.

I certify that the above attachment notice was published in the Mattoon Journal, a newspaper published in Mattoon, Coles Co., Ills., from the 5th of December for six consecutive weeks and until the issue of Jan'y 20th, 1872, including that issue, and that I am the publisher of said newspaper.

T. E. WOODS.

In the common pleas court, city of Mattoon, second day Feb'y term, 1872.

FEB'Y 6TH, A. D. 1872.

Court convened pursuant to adjournment. Present, the same as on first day of term.

MELVILLE B. ABELL, JACOB O. RUDY, STEPHEN D. Dale,
v.
J. EDWIN CONANT, WILLIAM M. AVERY. } Attachment in aid.

58 Now comes the defendants, by Bennett, their attorney, and, entering their appearance, files their affidavit of non-residence, and moves the court for a change in the venue hereof into the circuit court of Coles County; which said motion, being heard, is by the court taken under advisement.

In the common pleas court, city of Mattoon, fourth day Feb'y term, 1872.

FEBRUARY 8TH, 1872.

The court convened pursuant to adjournment. Present, the same as on first day of the term.

MELVILLE B. ABELL, JACOB O. RUDY, Stephen D. Dale,
vs.
J. EDWIN CONANT, WILLIAM M. AVERY. } In attachment in aid.

Now again come the parties, by their attorneys, when the plaintiffs

file certificates of publisher, and make proof of publication of attachment notice in this behalf.

59 In common pleas court, city of Mattoon, seventh day February term, 1872.

FEB'Y 12, A. D. 1872.

Court convened pursuant to adjournment. Present, the same as on first day of term.

MELVILLE B. ABELL, JACOB O. RUDY, Stephen D. Dale, *vs.* J. EDWIN CONANT, WILLIAM M. AVERY. } Attachment in aid.

Now again come the parties, by their attorneys, when the motion for a change of venue in this behalf, by the defendants made, having been considered by the court, is sustained, and the venue hereof ordered changed into the circuit court of Coles County.

STATE OF ILLINOIS,
County of Coles, City of Mattoon, ss:

I, H. C. Wortham, clerk of the common pleas court of the city of Mattoon, do hereby certify that the foregoing papers, marked A
60 B C D E F G H I J K are all the original papers and a true and correct transcript of the record and abstract of the fee-bill in the hereinbefore-named cause, to wit, Abell, Rudy & Co. vs. J. Edwin Conant & Co., as appears from the files and records of the said court in the clerk's office thereon, at the city of Mattoon, Illinois.

In testimony whereof I have hereunto set my hand and affixed the judicial seal of said court, at Mattoon, Illinois, this 8th day of April, A. D. 1872.

[SEAL.]

H. C. WORTHAM, *Clerk.*
By C. B. BOSTWICK, *Dep'ty.*

And be it remembered that afterwards, to wit, on the tenth day of April, in the year of our Lord one thousand eight hundred and seventy-two, it being the second judicial day of a regular term of the Coles County circuit court, held at the court-house in the city of Charleston, there appears of record on the records of said court an order in
61 said cause in the words and figures following, to wit:

MELVILLE B. ABELL, JACOB O. RUDY, AND Stephen D. Dale, *vs.* J. EDWIN CONANT AND WILLIAM M. AVERY. } 2684. In assumpsit. Attachment in aid venue from common pleas court, city of Mattoon.

Now come the parties, by their attorneys, when, on motion of the defendants' attorneys, the rule to plead in this behalf is extended to Friday morning, the fourth judicial day of this term, &c.

And be it remembered that afterwards, to wit, on the 16th day of April, in the year last aforesaid, at the term of the court aforesaid, there appears of record on the records of said court these further orders and proceedings of said court, to wit:

62 MELVILLE B. ABELL, JACOB O. RUDY, and Stephen D. Dale, *vs.* J. EDWIN CONANT AND WILLIAM M. AVERY. } In assumpsit. Attachment in aid venue from common pleas court of the city of Mattoon.

Now again come the parties, by their attorneys, when the defendants withdraw their motion to quash the writ herein, heretofore filed in this behalf, thereupon, by agreement of the parties, it ordered by the court that this cause stand continued, &c.

And be it remembered that afterwards, to wit, on the ninth day of November, A. D. 1872, at the term of the circuit court first herein aforesaid, there appears of record on the records of said court (it being the eleventh judicial day of said term) the following orders, judgment, and proceedings of said court, to wit:

63 MILVILLE B. ABELL, JACOB O. RUDY, AND Stephen D. Dale, partners under the firm-name of Abell, Rudy & Co., *vs.* J. EDWIN CONANT AND WILLIAM M. Avery. } 2684. Assumpsit & attachment in aid.

And now at this day came the plaintiffs herein, by Clark, their attorney, and the defendants, being three times solem'ly called, come not, but make default and remain wholly undefended herein, and it appearing to the satisfaction of the court that the said defendants have had due notice of the pendency of this suit by service of process according to law, it is ordered that judgment go by default, and that the plaintiffs recover of said defendants the damages in their declaration herein mentioned, together with costs of suit, and the court now assess said damages at the sum of twenty-one hundred and thirty-four dollars, ($2,134.)

It is therefore ordered and adjudged by the court that the said plaintiffs recover of and from the said defendants the said sum of two thousand one hundred and thirty-four dollars, their damages aforesaid,
64 together with the costs and charges in this behalf expended, by the clerk to be taxed, and that execution issue therefor, &c.

And it is further ordered that a special execution issue herein upon which to sell the property levied upon by virtue of the attachment herein, to wit, one locomotive-engine known as the A. N. Smyser.

And be it remembered that afterwards, to wit, on the 12th day of Dec., in the year of our Lord one thousand eight hundred and seventy-two, there was issued out of the office of the clerk of the circuit court aforesaid a writ of fieri facias, or special execution, in the words and figures following, to wit:

STATE OF ILLINOIS,
Coles County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that of the following-described goods and chattels of J. Edwin Conant and William M. Avery, to wit, one locomotive-
65 engine known as the A. N. Smyser, heretofore, to wit, on the 28th day of October, 1871, levied upon by virtue of an attachment in this cause in your county, you cause to be made the sum of twenty-one

hundred and thirty-four dollars, ($2,134) with interest thereon from the ninth day of November, A. D. 1872, until paid, which Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale, partners under the firm-name of Abell, Rudy & Co., lately in our circuit court for the said county of Coles, recovered against said Conant & Avery for damages in an action of assumpsit & attachment; also one hundred & thirty-three dollars and forty cents, which was awarded by our said court to said Melville B. Abell, Jacob O. Rudy, and Stephen D. Dale, partners, &c., for costs and charges in that behalf expended, whereof the said J. Edwin Conant and William M. Avery are convicted as appears to us of record, and have you the money at the clerk's office of said court, at Charleston, in ninety days from date thereof, to render to the said Abell, Rudy & Dale
66 their damages, interest, and cost aforesaid, and have you then and there this writ.

Witness W. W. McDonald, clerk of said court, and the judicial seal thereof, at Charleston, this 12th day of December, A. D. 1872.

[SEAL.] W. N. McDONALD, *Clerk*,
By W. J. GREGG, *Deputy*.

Upon the back of which said execution are the following several endorsements, to wit:

"Came to hand Decr. 12th, 1872, at 10 o'clock a. m.
"OWEN WILEY, *S. C. C.*,
"By V. R. CURD, *Dep'ty*."

"DECR. 14TH, 1872.—By virtue of the within writ of execution, I have this day levied upon the within-described property, to wit, one locomotive-engine known as the A. N. Smyser, as I am herein commanded.
"OWEN WILEY, *S. C. C.*,
"By V. R. CURD, *Dep'ty*."

"DEC. 24TH, 1872.—This execution is entitled to a credit of one thousand dollars by sale to S. D. Dale of the above-described property, the same having been duly advertised according to law.
"OWEN WILEY, *S. C. C.*,
"By V. K. CURD, *Dpty*."

67 "MARCH 14th 1873.—Returned no property found out of which to make the balance.
"OWEN WILEY, *S. C. C.*,
"By V. K. CURD, *Dep'ty*."

"The judgment on which this execution is issued is entitled to a credit of five hundred dollars.
"HORACE S. CLARK,
"*Atty. for Plffs.*"

I, Augustus H. Chapman, clerk of the circuit court of Coles County, in the State aforesaid, do dereby certify the above and foregoing to be a true, perfect, and complete copy of all the papers, orders, and proceedings (a complete transcript) in a certain cause pending in said court, on the common-law side thereof, wherein Melville B. Abell, Jacob O. Rudy, & Stephen D. Dale are plaintiffs, and J. Edwin Conant and William M. Avery are defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Charleston, this tenth day of June, A. D. 1873.

[SEAL.] A. H. CHAPMAN, *Clerk*.

68 I, James Steele, sole presiding judge of the 27th judicial circuit of the State of Illinois, which circuit comprises the county of Coles, do hereby certify that Augustus H. Chapman is clerk of the Coles County circuit court, that his signature to the foregoing certificate is genuine, and that said certificate is in due form of law.

Given under my hand this 10th day of June, A. D. 1873.

JAMES STEELE, *Judge.*

(Endorsed:) Filed June 15, 1872. J. A. Jones, clerk.

Which was admitted without objection, and it was admitted that the engine & tender A. N. Smyser, now in suit, was sold as stated in said record, & under the proceedings therein stated & set forth, and that said record & proceedings were regular & legal if said property was that of Conant & Co.

PHILIP CAMPBELL, a witness on behalf of defendant, testified as follows:

I was the agent of the defendant Robert G. Hervey, and as such agent bought the engine & tender Alfred N. Smyser of *Abill Reed* &
69 Co., for $3,000; paid that for the engine and tender. I purchased the engine and tender about the last of December, A. D. 1872.

GEORGE W. PARKER, a witness on behalf of defendant, testifies as follows:

The engine' Alfred N. Smyser and Olney No. 1 were purchased by Conant & Co. of the plaintiff in 1871, and were being used on the Decatur, Sullivan & Mattoon Railroad. Conant & Co. failed not long afterwards. The directors of the railroad to' forcible possession of it and the rolling-stock in 1871. An arrangement was made, with the consent of Conant & Co., by which the road, with the stock on it, was turned over to Mr. Ingersol, president of the Cleveland Iron Company, for the purpose of operating the same and making the debt due the Cleveland Iron Company from Conant & Co. This did not include the engine & tenders Alfred N. Smyser, it being in the hands of the sheriff on attachment, under which it was afterwards sold, but did include the engine & tender Olney. Conant & Company were then indebted to the Cleveland
70 Iron Company more than $100,000.

Cross-ex.:

In using the words "purchase," I mean Conant & Co. obtained the engine under the contract read in evidence.

M. S. SANDERS, a witness on behalf of defendant, testifies as follows:

I was the general manager of the Decatur, Sullivan & Mattoon Railroad Company. The Chicago & Illinois Southern Railroad Company & the Decatur, Sullivan & Mattoon Railroad Company mean one & the same thing. As such manager I had possession of the engine Olney No. 1 and tender, under Ingersoll, from the time Ingersoll obtained it up to the 3d day of Jan'y, A. D. 1873, when the Chicago & Ill. Southern Railroad Company was leased to the Paris & Decatur Railroad Company. This engine Olney was leased and transferred with the railroad, and at the time the engine and tender Olney was replevied, it was in the possession of the Paris & Decatur R. R. Co. under that lease. While I was managing the road for Ingersoll Mr. Mason, plaintiff' treas-
71 urer, sent me papers marked "Exhibit' E & F," which exhibits were offered in evidence and are as follows:

E.—(Copy.)

PROVIDENCE, *July 27th*, 1872.

Chicago & Illinois Southern R'w'y Co. to Rhode Island Locomotive Works, Dr.

1872.			
Jan'y 4.	Cash paid note		3,647 12
Feb'y 17.	do. do. do. & protest		3,651 16
7.	Note due this day, charged back		3,734 95
24.	Cash paid note		3,580 16
Ma. 4.	Do. do. do.		3,693 64
" 18.	Do. do. do. & protest		3,582 51
Ap'l 4.	Do. do. do.		3,715 90
" 17.	Do. do. do.		4,942 73
May 18.	Do. do. do. & protest		3,719 90
" 25.	Do. do. do. & do.		3,652 47
June 16.	Do. do. do.		3,647 90
July 19.	Do. do. do. & protest		5,035 72
			$46,604 16

CR.

Jan. 1.	By note 60 da. date	3,693 64		
	Less int. at 9½ %, b'k'ge & stamp	72 49		
			3,621 15	
April 15.	By P. J. Avery's note, indorsed by J. E. C. & Co., 90 days, Ap'l 13th	5,030 82		
	Less int. at 8½ %, b'k'ge & stamp	123 24		
			4,907 58	8,528 43
	Due by average Ap'l 16th, 1872			$38,075 43
July 27.	102 days' interest to date, at 7 %			755 15
				$38,830 58
72	MEMO.—1 note due 24 August			3,715 90
	1 do. " 16 September			3,715 90

STATE OF RHODE ISLAND, &C.,
City & County of Providence, ss :

Be it known that in the said city of Providence, on this ninth day of August, A. D. one thousand eight hundred and seventy-two, before me, Henry Martin, a notary public for said county, personally appeared Earl P. Mason, known to me to be the treasurer of the Rhode Island Locomotive Works, and made oath that the above account is just and true, as it stands stated, and that he hath not, either directly or indirectly, received any part or portion thereof, or security or satisfaction for the same.

Witness my hand and notarial seal, at said Providence, the day and year last aforewritten.

[SEAL.] (S'g'd) HENRY MARTIN,
Notary Public.

(Endorsed:) Filed June 15th, 1874. J. A. Jones, clerk.

73 F.—(Copy.)

Statement of engines furnished J. Edwin Conant & Co., contractors for the Chicago & Illinois Southern R'd Co., by the Rhode Island Locomotive Works.

1871.			
April	5.	1 locomotive-engine, "Joseph Welborn," #1 ...	11,500 00
May	10.	1 locomotive-engine, "Horace Hayward," #2.	11,500 00
August	21.	1 locomotive-engine, "Alfred N. Smyser," #3.	11,500 00
Sept.	13.	1 locomotive-engine, "Olney," # 4.....	11,500 00
			$46,000 00

(Endorsed:) Filed June 15, 1874. J. A. Jones, clerk.

Mr. Mason sent them as accounts or claims against the Chicago & Illinois Southern R. R. Co. These accounts were sent to me about the last of July, 1872. When these papers (E & F) were sent, the officers of the plaintiff understood that the railr. company had assumed to perform the contracts of Conant & Co.

Testimony of Isaac Keys.

ISAAC KEYS, being called on behalf of defendant, testified:

We took a contract in the spring of 1871 to build part of the road from Mattoon to Decatur, under Conant & Co. They then claimed to be the owners of the engines & tenders Olney & Alfred N.
74 Smyser; we contracted with them, on the faith of that statement. They had one other engine, the Hayward; this was in March, 1871, that we took the contract.

Testimony of Fenner.

Plaintiff, in rebuttal, called one FENNER as a witness, who testified as follows:

I was a clerk in office of plaintiff. The accounts marked "Exhibits E & F" were sent by the plaintiff to the Chicago & Illinois Southern R. R. Co. under the impression that the Cleveland Iron Comp'y had taken possession of the R. R. Co., and intended to pay for the engines. We were informed that the R. R. Co. intended to go on and complete the contract. We were willing for the R. R. Co. to have them if the' paid for them.

Cross-ex.:

The engines named in the account included the engines and tenders Smyser & Olney involved in this suit. The contract' between the plaintiffs and Conant & Co. were written in Rhode Island, sent to New York, and there signed by Conant & Co.; then sent back to Rhode Island
75 & signed by the plaintiff.

GEORGE INGERSOLL, of Cleveland, testified:

I took possession of the Chicago & Ill. So'th. R. R. for the purpose of securing the debt due the Cleveland Iron Co. from Conant & Co.

GEORGE W. PARKER, being recalled, testified:

That the directors of the Chicago & Ill. Southern R. R. Co. took possession of the property, including the Olney & tender, in April, 1872, in 1872, and turned it over immediately to Ingersoll, but never had possession of the A. N. Smyser & tender, that then being in the hands of the sheriff under attachment.

This was all the evidence offered by either party in this case.

Special finding of the court.

And thereupon the court found the following special verdict for the plaintiff:

That the lease offered in evidence by plaintiff was a subsisting executory contract between the parties thereto.

That the plaintiffs had not parted with the legal possession of
76 the locomotive in controversy.

That the plaintiff had never received payment for the locomotive in controversy other or further than as stated in the face of their lease.

That plaintiffs delivered to J. Edwin Conant & Co. the said locomotive to be used by them in the State of Illinois, and that said locomotive was so used in the State of Illinois.

That the possession of J. Edwin Conant & Co. was the possession of the plaintiff.

That the defendant obtained possession of the locomotive in controversy in due form of law, under execution, levy, and sale, in pursuance of a valid judgment obtained in a court of competent jurisdiction, after due service upon the parties thereto in the suit entitled Abell, Rudy & Co. vs. J. Edwin Conant & Co.

That sale under said execution was made by an officer duly authorized thereto to the defendant Robert G. Hervey, and that payment was made in the full amount bid at said sale by said purchaser to said offi-
77 cer, and that the said officer delivered the said locomotive to said Hervey.

That subsequent to such sale and delivery by said officer to said Hervey, plaintiffs placed upon record, in the proper recorder's office in the county of Coles, in the State of Illinois, where the said property was held, the said lease, in the chattel-mortgage records in said county.

That such recording of said lease was more than one year subsequent to the sale of said locomotive under said execution and levy.

That said sale by said officer to said Hervey was under a special execution, as shown by the public records of said Coles County.

Wherefore the court found for the plaintiff, and gave judgment accordingly.

To which special findings of the court, and to each and every part thereof, and to the rendition of judgment thereon, the defendants then and there excepted.

The defendant then and there entered a motion for a new trial,
78 which motion was by the court overruled.

To which action of the court in refusing a new trial defendants then and there excepted.

And whereas the matters and things herein do not appear of record, the defendants ask that this their bill of exceptions be signed and sealed by the court and made a part of the record; which is done.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed June 15th, A. D. 1874. J. A. Jones, clerk.

And afterwards, to wit, on the eighth day of August, of the year last aforesaid, came again said defendant and filed its bond herein; which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents, that we, The Paris & Decatur Railroad Company, Robert G. Hervey, H. Crea, & James C. Lake, of the

county of Edgar and State of Illinois, are held and firmly bound
79 unto the Rhode Island Locomotive Works in the penal sum of one thousand $\frac{}{100}$ dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at Paris, Illinois, this 20th day of August, in the year of our Lord one thousand eight hundred and seventy-four.

The condition of the above obligation is such, that whereas the said The Rhode Island Locomotive Works did, on the 15th day of June, one thousand eight hundred and seventy-four, at a term of court then being holden within and for the southern district of Illinois, in the city of Springfield and State of Illinois, obtain a judgment against the above bo'nden Paris & Decatur R. R. Co. & Robert G. Hervey, in a certain action of replevin for property therein described, & one cent damages and costs of suit, from which judgment the said railroad company & Robert G. Hervey has prayed for and obtained an appeal to the Supreme Court of the United States:

80 Now, if the said railroad company and Robert G. Hervey shall duly prosecute said appeal, and shall moreover pay the amount of the said judgment, costs, interest, and damages rendered and to be rendered against them, the said railroad company & said Hervey, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

{ PARIS & DECATUR RAILROAD COMPANY, L. S. }

THE PARIS & DECATUR R. R. CO.,
By JOHN J. MARTIN, *Sec. & T.* [L. S.]
ROBERT G. HERVEY. [L. S.]
H. CREA. [L. S.]
JAMES C. LAKE. [L. S.]

Approved.
S. H. TREAT, *Dist. Judge.*

(Endorsed:) Filed this 8th day of August, A. D. 1874. J. A. Jones, clerk.

And afterwards, to wit, on said eighth day of August, of the year last aforesaid, a writ of error issued in said cause, in the words and figures following, to wit:

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between the Rhode Island Locomotive Works, plaintiff, and Robert G. Hervey and the Paris and Decatur Railroad Company, defendants, a manifest error hath happened, to the great damage of the said Robert G. Hervey and the Paris and Decatur Railroad Company, as by their complaint appears: We, being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things
82 concerning the same, to the Supreme Court of the United States,

together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the eighth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.]

J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

Filed August 8th, 1874.

J. A. JONES, *Clerk.*

83 UNITED STATES OF AMERICA, *ss:*

To the Rhode Island Locomotive Works, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein *wherein* Robert G. Hervey and the Paris and Decatur Railroad Company are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this eighth day of August, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

S. H. TREAT.

Service of the within citation is hereby acknowledged this 9th day of October, A. D. 1874.

HAY, GREEN & LITTLER,
Attys. for Deft. in Error.

(Indorsed:) Rhode Island Locomotive Works v. Robert G. Hervey and the Paris and Decatur Railroad Company. Citation.

84 CIRCUIT COURT OF THE UNITED STATES,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a true and complete copy of all the papers filed, proceedings thereon had, and process issued in a certain cause wherein the Rhode Island Locomotive Works is plaintiff and Robert G. Hervey and the Paris and Decatur Railroad Company are defendants, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this ninth day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.]

J. A. JONES, *Clerk.*

85 Supreme Court of the United States.

ROBERT G. HERVEY AND THE PARIS AND DECATUR RAILROAD COMPANY
vs.
RHODE ISLAND LOCOMOTIVE WORKS. } In error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-four.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, came the said Robert G. Hervey and the Paris and Decatur Railroad Company, by Robert G. Ingersoll and J. A. Eads, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit: That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said Rhode Island Locomotive Works to have or maintain its aforesaid action thereof against the said Robert G. Hervey and the Paris and Decatur Railroad Company; there is also error in this, to
86 wit, that by the record aforesaid, it appears that the judgment aforesaid given was given for the said Rhode Island Locomotive Works against the said Robert G. Hervey and the Paris and Decatur Railroad Company, whereas, by the law of the land, the said judgment ought to have been given for the said Robert G. Hervey and the Paris and Decatur Railroad Company against the said Rhode Island Locomotive Works; and the said Robert G. Hervey and the Paris and Decatur Railroad Company pray that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment, etc.

ROBERT G. INGERSOLL AND J. A. EADS,
Attorneys for Plaintiff in Error.

87 In the Supreme Court United States of America, October term, 1874.

ROBERT G. HERVEY AND THE PARIS AND DECATUR RAILROAD COMPANY
vs.
RHODE ISLAND LOCOMOTIVE WORKS. } Error to southern district of Illinois.

It is agreed by and between the plaintiffs in error and the defendant in error in the above cause, that the judgment of the court below shall be affirmed as to the locomotive Olney No. 1.

PARIS & DECATUR R. R. CO.,
By R. G. INGERSOLL, *Its Atty.*
RHODE ISLAND LOCOMOTIVE WORKS,
By HAY, GREENE & LITTLER, *Its Attys.*

(Indorsed:) Sup. Court U. S. 1874, Octo. term. No. 627. Robt. G. Hervey & al. vs. The Rhode Island Locomotive Works. Agreement that judgment stand affirmed as to locomotive Olney No. 1. Filed 23 November, 1874.

(Indorsement on cover:) No. 157. Robert G. Hervey and the Paris & Decatur R. R. Co., plaintiffs in error, vs. The Rhode Island Locomotive Works. S. Illinois C. C. U. S. Filed 15th October, 1874.

Supreme Court of the United States.

DECEMBER TERM A. D. 1876.

No. 157.

ROBERT G. HERVEY AND THE PARIS & DECATUR RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE RHODE ISLAND LOCOMOTIVE WORKS.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

ROBERT G. INGERSOLL,
Counsel for Plaintiff in Error.

Transcript Company, Printers, Peoria, Ill.

Supreme Court of the United States.

DECEMBER TERM A. D. 1876.

No. 157.

ROBERT G. HERVEY AND THE PARIS & DECATUR RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE RHODE ISLAND LOCOMOTIVE WORKS.

Error to the Circuit Court of the United States, for the Southern District of Illinois.

ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In this case the Rhode Island Locomotive Works on the 21st day of August, 1871, entered into a contract with J. Edwin Conant & Co., contractors, to

build the Chicago & Illinois Southern Railroad, which contract is set out on pages 10, 11 and 12 of the record. Under this contract, a certain locomotive and tender, called the Alfred N. Smyser, No. 3, were delivered to J. Edwin Conant & Co., and were by them removed to the State of Illinois; it being known at the time the contract was made by the Rhode Island Locomotive Works, that the locomotive and tender were to be taken to the State of Illinois, and used in the construction of the railroad in that State. J. Edwin Conant & Co. took possession of the said locomotive and tender, took the same to Illinois, and commenced the construction of the said railroad. Edwin Conant & Co. became embarrassed, contracted debts along the line of the road and failed to pay them. Conant & Co. claimed to be the owners of the Alfred N. Smyser, No. 3, engine, and parties contracted with them on the faith of their statement, taken in connection with the fact that they had the engine in possession. Afterwards, in October, 1872, suit was commenced by Melville B. Abill, Jacob O. Rudy, and Stephen D. Dale, against J. Edwin Conant, *et al.*, as appears by the record, page 13, and the plaintiffs recovered a judgment against the defendants in the sum of $2,134, together with their costs, and a special execution was issued for the sale of the property levied upon by virtue of the attachment, to-wit: The engine and tender known as the A. N. Smyser, No. 3; and afterwards, on the 24th day of December, 1872, the execution was returned with the credit of $1,000, by a sale to S. D. Dale, acting for Abill, Rudy

& Co., of the above described property, viz, as will be seen on the 25th page of the record. That, afterwards, Philip Campbell, acting for and on behalf of R. G. Hervey, bought the engine A. N. Smyser, No. 3, of Abill, Rudy & Co., for $3,000. Upon this state of facts the following special verdict was found for the plaintiff below:

1st. That the lease offered in evidence by the plaintiff below, was a subsisting executory contract between the parties thereto, that the plaintiff had not parted with the legal possession of the locomotive in controversy.

2d. That the plaintiff below had never received payment for the locomotive in controversy, other or further than as stated in the face of their lease.

3d. That the plaintiff below delivered to J. Edwin Conant & Co. the said locomotive, to be used by them in the State of Illinois, and that the said locomotive was so used in the State of Illinois.

4th. That the possession of J. Edwin Conant & Co. was the possession of the plaintiff below.

5th. That the defendant below obtained possession of the locomotive in controversy in due form of law, under execution, levy and sale in pursuance of a valid judgment obtained in a court of competent jurisdiction, after due service upon the parties thereto, in a suit entitled Abill, Rudy & Co. *vs.* J. Edwin Conant & Co.

6th. That the sale under said execution was

made by an officer duly authorized thereto, to the defendant below, Robert G. Hervey, and that payment was made in the full amount bid at said sale by said purchaser to said officer, and that said officer delivered the said locomotive to said Hervey.

7th. That subsequent to such sale and delivery by said officer to said Hervey, the plaintiff below placed upon record in the proper recorder's office, in the County of Coles, in the State of Illinois, where the said property was held, the said lease in the chattel mortgage records of said county.

8th. That such recording of said lease was more than one year subsequent to the sale of said locomotive under said execution and levy.

9th. That said sale by said officer to said Hervey was under a special execution as shown by the public records of said Coles County. Wherefore, the Court found for the plaintiff below, and gave judgment accordingly.

I.

It is impossible for us to tell whether the contract in this case was a chattel mortgage, a conditional sale, an absolute sale, or precisely what. The contract recites that the party of the first part is the owner of the engine, that the party of the second part is desirous to use it, and eventually of purchasing it; and that therefore, in consideration of one dollar paid to the party of the first part, by the party of the second part, and in consideration of the covenants and agree-

ments thereinafter contained, the party of the first part agrees to let and lease, and does let and lease to the party of the second part, the said locomotive engine and tender, with the right to place the same upon its railroad, and to use the same in the usual manner; and in consideration thereof the party of the second part covenants and agrees to pay to the party of the first part, for use and rent, the sum of $12,093.96, as follows :

1st. Ten per cent. in cash, amounting to $1,150, one note due February 24th, 1872, for $3,580.16; one note due May 24th, 1872, for $3,647.90, and one note due August 24th, 1872, for $3,715.90. In other words, according to this agreement, the party of the second party agrees to pay $12,093.96 rent, for the use of an engine one year. Evidently this was not the intention of the parties. In addition to this, the party of the second part was to keep the engine in good order; and the party of the first part further agreed that if the party of the second part paid all the notes promptly and all renewals of the same, then it would sell, and transfer and convey to the party of the second part, the locomotive engine and tender in the condition it then might be. And it was further agreed that if the party of the second part failed to make the payments, then the party of the first part should be at liberty to enter upon and take possession of the locomotive; and the party of the second part further agreed, if any default was made, that they would within thirty days thereafter, deliver the locomotive engine to the party of the first part; and then it was

the duty of the party of the first part to sell it, and have the proceeds of the sale pay what might be due upon the notes, and the expenses of the sale; and, if any balance was left, deliver the same to the party of the second part.

Under this contract Conant & Co. took possession of the engine, took it to the State of Illinois, got credit upon the fact that they had it in their possession, failed to pay their debts, suit was brought, the engine was attached, the engine was sold. This engine was purchased in good faith by the plaintiff in error for the sum of $3,000, and after such purchase, and after the engine was in the possession of the plaintiff in error, then the defendant in error had this contract put upon record, the same having been recorded on the 28th day of January, 1873.

What we claim is that the property really belonged to J. Edwin Conant & Co.; that if it did not belong to J. Edwin Conant & Co., and the Rhode Island Locomotive Works had the right to take possession of the engine, it was a right they should have exercised within a reasonable time, and, failing to do that, they are estopped.

All the *indicia* of ownership were in J. Edwin Conant & Co., and afterward in Abill, Rudy & Co. The attachment proceedings were all regular, and the sale upon its face was regular and valid.

II.

We insist that the contract in question is subject to the laws of the State of Illinois.

In the case of *Cyrus H. McCormick, et. al., vs. George M. Hadden*, 37 Ill., 370, it is held that where the vendor of personal property delivers possession to the purchaser under an agreement that the property is to be considered as belonging to the vendor until the payment of the purchase money, notwithstanding such delivery of possession, such agreement as to the creditors of the purchaser is fraudulent and void. See also

Joel B. Ketchem vs. Michael Watson, 24 Ill., 591.
Thompson vs. Yeck, 21 Ill., 73.
Murch vs. Wright, 46 Ill., 487.

In the case last mentioned "L" took from "M" a piano at the price of $700; "L" paid fifty dollars down, which was called rent for the first month, and was to pay fifty dollars each month as rent until the $700 was paid, when "L" was to own the piano. This was held to be a conditional sale, with a right of rescision on the part of "M," in the event of "L's" failure to perform, but that the piano, notwithstanding the sale was conditional, was subject to a levy by the creditors of "L."

This case is precisely like the case at bar. The question is whether a secret lien of this kind, in fraud of the chattel mortgage laws of the State of Illinois,

can be maintained. The Supreme Court of Illinois has decided again and again that such a lien is a fraud as to third persons, and can be maintained only in one way, viz: By complying with requirements of the chattel mortgage act.

In this case it is not only an inference of law, but it is a fact substantiated by the evidence, that the credit was given to J. Edwin Conant & Co. on account of the engines which they had in their possession, and which they claimed to own, and over which they exercised all acts of ownership. The lien of the Rhode Island Locomotive Works, if any existed, was a secret lien, good, of course, as between the parties, but not as to third persons. Had the Rhode Island Locomotive Works wished to have made their lien good in the State of Illinois, they should have recorded their agreement under the chattel mortgage act of this State.

All of which is respectfully submitted,

ROBERT G. INGERSOLL,

Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1876.

ROBERT G. HERVEY, AND THE PARIS & DECATUR RAILROAD COMPANY,
Plaintiffs in Error,
vs.
RHODE ISLAND LOCOMOTIVE WORKS,
Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

HAY, GREENE & LITTLER,

Of Counsel for Defendant in Error.

SPRINGFIELD:
Frank Hudson, Jr., Printer, 221 S. 5th Street.
1876.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1876.

ROBERT G. HERVEY, AND THE PARIS & DECATUR RAILROAD COMPANY, *Plaintiffs in Error,*

vs.

RHODE ISLAND LOCOMOTIVE WORKS, *Defendant in Error.*

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT OF HAY, GREENE & LITTLER,

FOR DEFENDANT IN ERROR.

The facts in this case are almost exactly the same as those stated in the case of the Indianapolis, Bloomington & Western Railway Co. vs. The Rhode Island Locomotive Works. We therefore respectfully refer to our argument in that case, which it would be useless to repeat.

The only facts necessary to refer to are as follows: The contract was precisely the same as that set forth in the other case, and was executed Aug. 21, 1871. The first note was due Feb. 24, 1872. The attachment was levied Oct. 28, 1871. Judgment was rendered Oct. 9, 1872, for $2,134.00 and costs, and sale of engine, "Alfred N. Smyser," Dec. 24, 1872, for $1,000.

Two engines were originally involved in this cause, but since the writ of error was sued out a stipulation was filed in this Court by the parties in which it was agreed that the judgment below should be affirmed as to the engine "Olney." This leaves the engine Smyser the only subject of controversy. (Stipulation appears at the end of printed record.)

We respectfully submit what we have said in the former case, as equally applicable here.

HAY, GREENE & LITTLER,
of Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

DECEMBER TERM, A. D. 1876.

ROBERT G. HARVEY and the PARIS & DECATUR RAILWAY CO.,

Plaintiffs in Error.

VS.

THE RHODE ISLAND LOCOMOTIVE WORKS.

Defendant in Error.

ALSO

THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO.,

VS.

THE RHODE ISLAND LOCOMOTIVE WORKS.

ADDITIONAL ARGUMENT FOR DEFENDANT IN ERROR.

HAY, GREENE & LITTLER,

FOR DEFENDANT IN ERROR.

SPRINGFIELD:
Frank Hudson, Jr., Printer, 221 S. 5th Street.
1876.

Supreme Court of United States.

DECEMBER TERM, A. D. 1876.

ROBERT G. HERVEY and the PARIS & DECATUR RAILWAY CO.,

PLAINTIFFS IN ERROR,

vs.

THE RHODE ISLAND LOCOMOTIVE WORKS,

DEFENDANT IN ERROR.

ALSO

THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO.,

vs.

THE RHODE ISLAND LOCOMOTIVE WORKS.

ADDITIONAL ARGUMENT FOR DEFENDANT IN ERROR.

Since filing our argument in the above cause, that of counsel for plaintiff in error has been filed.

We are not aware that errors had been assigned anywhere as required by the rules of this Court.

Plaintiffs in error claim to rely on the Chattel Mortgage Act of the state, yet they do not set it out, or any part of it.

We submit that the Chattel Mortgage Act has nothing whatever to do with the case. The portions of that act which require the recording of the instrument within less than five years refer solely to cases in which a party having once been the owner of chattels seeks to sell or pledge them and yet retain possession.

The only statutory provisions which relate to cases like this are directly against the position assumed by plaintiff in error.

They are found in the Statute of Frauds, and are intended to cover cases in which possession of chattels has been delivered to one who never had the title, while the ownership remains in another.

See Peters vs. Smith, 42 Ill., 416.

The decision in this case contains a section of the law which has been in force for many years, and is still in force. If any portion of the statute law relates to the cases at bar it is this.

We desire to add this single remark to what we have already said respecting the place where the contract was made. It is fully settled that a contract lawful where made is lawful anywhere, unless it contravenes the positive law or the public policy of the place where it is to be executed. Now, as we have already shown, the case at bar does not fall within any prohibitory statute. Either this is true or almost every Judge in England and in this country, outside of Illinois, has been mistaken. The parties in Rhode Island could not be held responsible for an attempt to violate an Illinois law, simply because they acted upon a construction given to like laws by almost every court in the world.

They did not violate the public policy of Illinois, unless that policy be accepted as declared by the decisions of the Supreme Court cited by plaintiff in error.

Granting that these decisions do declare the policy of the state, (which we deny except for argument) yet the same Court has decided that the public policy of the state can not be declared by its Courts.

Carroll vs City of East St. Louis, 67 Ill., p. 571.

So that neither by the terms of the statute law, nor by the declared public policy of the state, is the contract on which we rely void or fraudulent.

We also refer to the case lately decided on just such a contract, and just such a statute, by Judge Dillon, in the U. S. Circuit Court of Missouri

Rogers Locomotive Works vs. Lewis, Chicago Legal News of Dec. 2d, 1876, p. 84.

HAY, GREENE & LITTLER,

For Defendant in Error.